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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JANUARY TERM, 1986

CATERPILLAR TRACTOR CO.,

Petitioner,

v.

WILLIAM WHEELER and JUDITH WHEELER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED

Whether Congress' extensive regulation of nuclear safety issues, including the creation of an explicit remedy for employees discharged because of their concern over nuclear safety (Energy Reorganization Act, 42 U.S.C. § 5851 (1982)), preempts the state common law tort created by the Illinois Supreme Court to remedy the identical conduct prohibited by the federal act.

STATEMENT REQUIRED BY RULE 28.1

Caterpillar Tractor Co. is not a subsidiary or affiliate of a publicly owned corporation and, therefore, has no parent corporation. In addition to wholly owned subsidiaries, Caterpillar has ownership interests, either directly or through wholly-owned subsidiaries, in the following:

Caterpillar Tractor Co., Ltd.
Caterpillar-Mitsubishi, Inc.
Tractor Engineers, Ltd.
P.T. Natra Raya
Equipment Financing Associates
S.A. Des Foundries Aet Seaieries De Paris-Seine

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WILLIAM WHEELER and JUDITH WHEELER,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, Caterpillar Tractor Co. (hereinafter "Caterpillar" or the "Company"), respectfully prays that a Writ of Certiorari issue to review a decision and order of the Illinois Supreme Court.

OPINION BELOW

The opinion of the Illinois Supreme Court is reported *sub nom, Wheeler v. Caterpillar Tractor Co.*, 108 Ill. 2d 502, 485 N.E.2d 372 (1985) and is reproduced in Appendix A to this Petition. The opinion of the Illinois Appellate Court is reported at 123 Ill. App. 3d 539, 462 N.E.2d 1262 (1984) and is reproduced in Appendix B to this Petition. The opinion of the Circuit Court of Macon County, Illinois, is unreported and is reproduced in Appendix C to this Petition.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on October 18, 1985. Petitioner filed a timely Petition for Rehearing on November 8, 1985. The Petition was denied in an Order dated December 2, 1985, which is reproduced in Appendix D. This petition was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved in this matter is the Supremacy clause of the Constitution, Art. VI, cl. 2, which provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The primary statutory provision involved is the Atomic Energy Act, (as amended Energy Reorganization Act), 42 U.S.C. § 5800 *et seq.* Specifically, this case involves the following provision of that Act (Section 210, 42 U.S.C. § 5851 (1982)):

> § *5851. Employee protection*
>
> (a) *Discrimination against employee*
>
> No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.] or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].

(b) *Complaint, filing and notification*

(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission.

(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record

after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(c) *Review*

(1) Any person adversely affected or aggrieved by an order issued under subsection (b) of this section may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of Title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

(d) *Jurisdiction*

Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

(e) *Commencement of action*

(1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(f) *Enforcement*

Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of Title 28.

(g) *Deliberate violations*

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (for the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].

STATEMENT OF THE CASE

This Court has long tried to delineate the extent to which state law is preempted by federal legislation. This effort has assumed particular importance in the field of nuclear safety issues. *See Pacific Gas & Electric Co. v. State Energy Comm.*, 461 U.S. 190 (1983); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). The instant case again presents the critical question of whether Congress has left room for state action on issues of nuclear safety which are extensively regulated by federal statute (Energy Reorganization Act, 42 U.S.C. § 5851 (1982) (the "Act")). Specifically, this case raises the question of whether, on the question of nuclear safety, federal interests are paramount or whether state common law can provide a separate remedy for the discharge of an employee allegedly because of complaints that the company failed to comply with federal safety regulations for radioactive materials, conduct for which the federal statute provides an express remedy. The Illinois Supreme Court's resolution of this question conflicts with the Supremacy clause of the Constitution, with prior decisions of this Court and raises important questions of national policy.

The facts in this case are simple and straightforward. Caterpillar Tractor Co. operates a production facility in Decatur, Illinois. Respondent, William Wheeler, was employed in the Company's X-ray department as a radiographer. This department was one aspect of Caterpillar's quality control program. In 1979, the Company began to convert its quality control operations from electrically generated radiation to live source radiation using Cobalt 60 as the radiation source. As a radiographer, Wheeler was expected to use the Cobalt 60 unit for quality control purposes.

Wheeler, however, alleges that the installation of the unit by Caterpillar was not in compliance with Nuclear Regulatory Commission safety regulations and that he was not properly trained to handle a live source of radioactivity. Wheeler

claimed that the Cobalt 60 unit was unsafe and refused to work in the area. According to the allegations of the Complaint, Wheeler repeatedly sought to be transferred from the X-ray department after installation of the Cobalt 60 unit. When no transfer was forthcoming and Wheeler continued to refuse to work in the area, he was terminated from employment with Caterpillar.

Wheeler filed a complaint in Illinois state court claiming that he was discharged from his employment as the result of his complaints to his employer about nuclear safety violations. He argued that a number of violations of the Nuclear Regulatory Commission rules had occurred regarding the installation and operation of the Cobalt 60 unit. In the words of the Illinois Supreme Court, Wheeler alleged that his discharge "resulted from his employer's violation of federally mandated safety codes." (App. A 3). According to Wheeler, this discharge constitutes tortious conduct under Illinois state common law. The Illinois state trial court dismissed the complaint. That dismissal was affirmed by the Illinois Appellate Court for the Fourth District.

The Illinois Supreme Court reversed the lower courts and reinstated the case. The Court recognized that the federal Energy Reorganization Act (formerly the Atomic Energy Act) arguably provided a remedy for the alleged unlawful conduct. However, misinterpreting this Court's decisions in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Develop. Comm.*, 461 U.S. 190 (1983), and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Illinois Supreme Court concluded that the Act did not preempt the field of nuclear regulation and that the instant action was not preempted because it did not conflict with the Act. The Illinois Court concluded that:

> The protection of the lives and property of citizens from the hazards of radioactive material is as important and fundamental as protecting them from crimes of violence,

> and by the enactment of the legislation cited [the Act], Congress has effectively declared a clearly mandated public policy to that effect. We hold, therefore, that Counts III and VI stated a cause of action for retaliatory discharge which contravened the clearly mandated public policy.

108 Ill. 2d at ____, 485 N.E.2d at 377.

REASONS FOR GRANTING THE WRIT

This case presents the question of whether the extensive federal regulation of nuclear safety preempts the Illinois state court's creation of a separate common law remedy for conduct regulated by that federal enactment and where, moreover, the statute creates an express remedy for the conduct involved. This case specifically arises under the successor to the Atomic Energy Act, the Energy Reorganization Act, 42 U.S.C. § 5851 (1982), which is one of seven virtually identical anti-retaliation provisions found in various federal statutes. This Court has held that, on issues related to nuclear safety, Congress has totally preempted state action. *Pacific Gas, supra; Silkwood, supra.* The Illinois Supreme Court's decision directly conflicts with prior decisions of this Court under that Act. Moreover, the Illinois Supreme Court's decision raises important questions of the scope of national policy regarding nuclear safety.

I. THE ILLINOIS SUPREME COURT'S DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT

The doctrine of federal preemption is based on the Supremacy clause of the Constitution. This Court has repeatedly held that, under the Supremacy clause, Congress may completely occupy all or a part of a particular area and thereby preempt all state action in that area. *See Fidelity Federal Savings & Loan Ass'n v. de le Coesta,* ____ U.S. ____, 102 S. Ct. 3014, 3022 (1982); *Rice v. Sante Fe Elevator Corp.*, 331

U.S. 218 (1947). In the field of nuclear safety regulation, the area governed by the Act at issue, this Court has specifically held that the "federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." *Pacific Gas & Electric v. State Energy Resources Conserv. & Develop. Comm.*, ____ U.S. ____, 103 S. Ct. 1713, 1776 (1983).

In the instant case, Congress has comprehensively regulated nuclear safety and the handling of radioactive materials. This federal control is further implemented by extensive Nuclear Regulatory Commission administrative regulations. In order to "help assure that employers do not violate requirements of the Atomic Energy Act" (1978 U.S. Code Cong. and Adm. News 7304), Congress included a detailed remedial provision for employees allegedly discriminated against because of their actions in compliance with this statute. *Pacific Gas*, therefore, dictates that this comprehensive provision, as part of Congress' control of nuclear safety issues, preempts the field and leaves no room for state action. The state common law action sought by Wheeler and authorized by the Illinois Supreme Court, therefore, is totally preempted.

The Illinois Supreme Court, however, ignoring the broad preemptive sweep of this Court's opinion in *Pacific Gas*, reasons that *Pacific Gas* held that state legislation could co-exist with the present Act if it did not conflict with that Act. The Illinois Court then concludes that, since the state common law action does not conflict with the federal act, it is not preempted by that Act. This, however, was not the holding of *Pacific Gas*.[1] In

[1] Even if this were the holding of *Pacific Gas*, the purported state action does conflict directly with the federal statute. For example, Congress established specific time limits as short as thirty days for any employee who is "discharged or otherwise discriminated against" to file an administrative complaint with the Secretary of Labor. § 5851

(Footnote continued on following page.)

Pacific Gas & Electric, this Court was confronted with the issue of the preemptive effect of the Atomic Energy Act, as amended. After reviewing the Act, this Court concluded that Congress intended to totally preempt state action in the field of nuclear safety but had expressly left to the states only economic questions of energy generation. *Id.*, 103 S. Ct. at 1766.

> State safety regulation is not preempted only when it conflicts with federal law. Rather, the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states. When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption in whether the "matter on which the state asserts the right to act is in any way regulated by the federal government."

Id. at 1726 (quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)).

A year after *Pacific Gas*, this Court was confronted with the question of whether a state tort action could co-exist with the Act. *Silkwood v. Kerr-McGee Corp.*, ____ U.S. ____, 104 S. Ct. 615 (1984). In *Silkwood*, the plaintiff's estate brought a

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(Footnote continued from previous page.)

(b)(1). The Congressional concern for the expeditious resolution of these matters would be seriously undermined by the application of a two year state statute of limitations to an identical tort action. Morever, Congress delegated investigation of these complaints and enforcement of the Act to the Department of Labor, the administrative agency with expertise in these areas. § 5851(b)(2). The Illinois action, however, would be heard by a jury. Thus, the creation of a common law action for retaliatory discharge here would undercut the uniformity of enforcement Congress intended by the use of a single administrative body and by the broad administrative authority invested in the Secretary of Labor. Finally, Congress has established explicit remedies for complaints of retaliatory discharge (§ 5851(b)(2)(B) and § 5851(d)) which differ from those available in a common law tort action asserting the same claims.

common law state action for damages allegedly caused by exposure to radioactive materials. The Court concluded that a state tort action for damages caused by exposure to radioactivity could proceed despite congressional regulation of this area. Reviewing the legislative history of the Price-Anderson Act, this Court noted that Congress specifically allowed for the possibility of such actions.[2] The Court further observed that it "is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 104 S. Ct. at 673. Again, however, the Court noted the express Congressional intent to allow for such actions.

In this case Congress *has* specifically acted by creating a specific, detailed remedial mechanism for employees who are allegedly retaliated against because of their actions in promoting nuclear safety concerns. As part of the comprehensive federal regulation of the use of nuclear energy, Section 210 not only defines the protected class and prohibited conduct but provides a detailed administrative and judicial enforcement scheme for alleged violations of the statute. In light of the exclusive federal regulation of all aspects of nuclear safety, as established by *Pacific Gas*, this comprehensive federal "employee protection" statute completely preempts the state common law tort remedy created by the Illinois Supreme Court.

The Illinois Court's opinion, however, misreads this Court's holdings and, as a result, directly conflicts with those

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[2] The Price-Anderson Act is a portion of the Atomic Energy Act which establishes an indemnification procedure for operators of nuclear facilities for claims arising as a result of damages caused by major nuclear incidents. The legislative history of the Act clearly establishes a Congressional intent to allow state tort actions for personal injuries resulting from radioactive exposure. The instant case, however, does not involve such a claim or such an incident. Thus, the Price-Anderson Act and its legislative history are not relevant to this case.

decisions.[3] This Court has held that, under the Act in question, Congress has chosen to completely occupy all areas of nuclear safety regulation. While Congress has explicitly retained some room for state action in other areas of energy regulation, where Congress has acted, the test for preemption is whether the state action relates to a matter which is in any way regulated by the federal government. *Pacific Gas, supra,* at 1726. Since Congress has acted on the precise question confronted by the Illinois court, the state action at issue in this case is preempted.

The Illinois Supreme Court's decision does violence to the principles established by this Court's decisions. In essence, the decision allows state action in the area of nuclear safety concerns even when that action is explicitly regulated by the comprehensive Act. In so doing, the Illinois court totally convolutes this Court's holdings by ignoring the preeminent effect of federal regulation in this area. In short, this Court has

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[3] The Illinois Court's decision is further at odds with the preemptive sweep provided other federal employment statutes by this Court. For example, the National Labor Relations Act creates a federal agency to administer alleged violations of federal labor law. As a result, the NLRA preempts state action which is arguably covered by that Act. *See San Diego Bldg. Trades Council v. Garman,* 359 U.S. 236 (1959). As this Court has noted in language directly applicable to this case:

> The rationale for preemption, then, rests in large measure upon our determination that when it set down a federal labor policy, Congress meant to do more than simply to alter the then-prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body . . . .

Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 288 (1971). *See also Allis-Chalmers v. Lueck,* ____ U.S. ____, 105 S. Ct. 1904 (1985); *Massachusetts Mutual Life Ins. Co. v. Russell,* ____ U.S. ____, 105 S. Ct. 3085 (1985).

established that in the critically important field of nuclear safety, Congress has precluded state action except in specific areas. By allowing state action in the face of specific federal regulation, the Illinois Supreme Court has directly contravened the decisions of this Court.

II. RESOLUTION OF THIS CONFLICT IS A MATTER OF GREAT NATIONAL IMPORTANCE

Not only is there a fundamental conflict on the question presented here, but the prompt resolution of the conflict is a matter of great national importance. Congress has determined that federal interests require exclusive federal control of all aspects of nuclear safety. The Illinois Supreme Court now deviates from that explicit congressional mandate and has established a precedent for further state departure from this basic principle in other areas of nuclear safety regulation.

Moreover, the Illinois Supreme Court's decision has profound and immediate effects on federal labor policy. The federal provision at issue in this case is not unique to the Atomic Energy Act. In fact, at least six other federal statutes contain virtually identical provisions.[4] The holding of the Illinois court, if allowed to stand, would afford a state license to act in a wide variety of areas in which the federal government has chosen to act.

The importance of the issue herein to the administration of national policy is plain. If Illinois is allowed to create a tort

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[4] *See* Toxic Substances Control Act, 15 U.S.C. § 2622 (1982) ("Employee Protection"); Asbestos School Hazard Detection and Control Act, 20 U.S.C. § 3608 (Cum. Supp. 1982) ("Employee Protection"); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1293 (Cum. Supp. 1985) ("Employee Protection"); Federal Water Poliution Control Act, as amended, 33 U.S.C. § 367 (1982) ("Employee Protection"); Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. § 6971 (1982) ("Employee Protection"); Clean Air Act, as amended, 42 U.S.C. § 7622 (1982) ("Employee Protection").

action for conduct regulated by federal statute for which the federal statute provides a remedy, other state courts may apply analogous tort theories with respect to a broad spectrum of other federal rights and remedies. Following the analysis of the Illinois court, conflicting state interests could easily become paramount, allowing the terms of federal statutes to be ignored or overridden.

The danger of this result is amply illustrated by the case at bar. Congress has determined that the regulation of nuclear safety is an issue of paramount national concern and has thus assumed exclusive control in this area. Part of that extensive regulation was the creation of an employee protection statute for retaliatory discharge which covers the precise conduct at issue in this case. The Illinois court, however, has chosen to ignore the procedures and remedies created by Congress and has created a separate remedy. The Illinois Supreme Court's decision impermissibly intrudes into an area which Congress has chosen to regulate and which this Court has decided is federally preempted.

In sum, the Illinois Supreme Court's decision attempts to regulate conduct which is the subject of exclusive federal regulation and undermines important policies embodied therein. The decision allows a state tort action to replace congressionally established procedures and remedial mechanisms. As such, the decision is repugnant to the decisions of this Court and creates an issue of fundamental national importance.

CONCLUSION

For the reasons stated, this Court should grant the Petition for Certiorari, summarily vacate the Illinois Supreme Court's decision and remand for appropriate action by the Illinois courts. Alternatively, the Court should grant the Petition and give the case plenary consideration.

Respectfully submitted,

CATERPILLAR TRACTOR CO.

By _____
One of Its Attorneys

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APPENDIX

APPENDIX A

William E. WHEELER, et al.,
Appellants,

v.

CATERPILLAR TRACTOR COMPANY, Appellee.

No. 60181.

Supreme Court of Illinois.
Oct. 18, 1985.

Rehearing Denied Dec. 2, 1985.

Former employee and his wife brought action against former employer, alleging retaliatory discharge. The Circuit Court, Macon County, Donald W. Morthland, J., granted employer's motion to dismiss, and employee and his wife appealed. The Appellate Court, 123 Ill.App. 3d 539, 78 Ill. Dec. 908, 462 N.E.2d 1262, affirmed and remanded. On allowance of petition by employee and his wife for leave to appeal, the Supreme Court, Goldenhersh, J., held that: (1) Congress did not intend to preempt field of retaliatory discharge of employee under Energy Reorganization Act provision which permits employee to be reinstated in his employment and recover compensatory damages; (2) whether allegedly retaliatory discharge for refusal to work in handling of radioactive cobalt 60 while operations were being conducted in violation of regulations promulgated by the Nuclear Regulatory Commission involved public policy, or matter of private concern, did not depend upon whether complaint was made to the regulatory authorities; and (3) complaint stated cause of action for a retaliatory discharge for refusing to work under conditions which countervened clearly mandated public policy.

Reversed and remanded.

Moran, J., filed dissenting opinion, in which Ryan, J., joined.

1. Pretrial Procedure

Where order to dismiss various counts of complaint was entered upon allowance of motion to dismiss, all facts properly pleaded had to be taken as true.

2. Appeal and Error

In determining sufficiency of counts of complaint dismissed upon allowance of motion to dismiss, Supreme Court must apply rule that no cause of action should be dismissed on pleadings unless it clearly appears that no set of facts can be proved which will entitle plaintiff to recover.

3. States

Control of radioactive materials was preempted by the enactment of the Atomic Energy Act [42 U.S.C.A. § 2011 et seq.]. Atomic Energy Act of 1954, § 1 et seq., as amended, 42 U.S.C.A. § 2011 et seq.

4. States

Congressional findings [42 U.S.C.A. § 2012] and declaration of policy [42 U.S.C.A. § 2011] of the Atomic Energy Act [42 U.S.C.A. § 2011 et seq.] enunciate a public policy which is national in scope. Atomic Energy Act of 1954, §§ 1 et seq., 1, 2, as amended, 42 U.S.C.A. §§ 2011 et seq., 2012.

5. States

Even in legislation in which Congress has not totally displaced state regulation in a specific area, state law is preempted to extent that it actually conflicts with federal law or if it stands as obstacle to accomplishment of the full purposes and objectives of Congress.

6. States

Congress did not intend to preempt actions for tort of retaliatory discharge by enacting the Energy Reorganization Act provision which permits employee to be reinstated in his employment and recover compensatory damages [42 U.S.C.A. § 5851]. Energy Reorganization Act of 1974, § 210, as amended, 42 U.S.C.A. § 5851.

7. Master and Servant

Whether facts involved in allegedly retaliatory discharge for refusal of employee to work in handling of radioactive cobalt 60 while operations were being conducted in violation of regulations promulgated by the Nuclear Regulatory Commission involved public policy, or were matter of private concern, did not depend upon whether complaint was made to the regulatory authorities, as legislation and regulation declared public policy and existence of that policy did not depend upon whether employee had communicated a complaint.

8. Master and Servant

Complaint, which alleged that employee was discharged in retaliation for his refusal to work in handling of radioactive cobalt 60 while operations were being conducted in violation of regulations promulgated by the Nuclear Regulatory Commission, stated cause of action for retaliatory discharge for refusing to work under conditions which contravened clearly mandated public policy of protecting lives and property of citizens from hazards of radioactive material. Atomic Energy Act of 1954, § 1 et seq., as amended, 42 U.S.C.A. § 2011 et seq.; Energy Reorganization Act of 1974, § 210, as amended, 42 U.S.C.A. § 5851.

Willoughby & Latshaw, K. Michael Latshaw of Counsel, Decatur, for appellants.

Hull, Campbell & Robinson, Decatur, for appellee.

GOLDENHERSH, Justice:

Plaintiffs, William E. Wheeler and Judith A. Wheeler, appealed from the order of the circuit court of Macon County dismissing with prejudice counts III and VI of their six-count complaint against defendant, Caterpillar Tractor Company, and striking from counts I, II, IV and V the prayers for punitive or exemplary damages. The appellate court affirmed (123

Ill.App.3d 539, 78 Ill.Dec. 908, 462 N.E.2d 1262), and we allowed plaintiffs' petition for leave to appeal (94 Ill.2d R. 315).

The appellate court affirmed the striking of the prayers for punitive damages, holding that the circuit court had entered no such order with respect to counts IV and V, and that, by failing to argue the point on appeal, plaintiffs had waived any error with respect to counts I and II. This appeal involves only counts III and VI.

In count III it was alleged that plaintiff, William E. Wheeler, had been employed by defendant since December 1955; that in August 1979 he was employed in defendant's X-ray department as a radiographer; that approximately eight months earlier he had been told by his supervisors that defendant was installing a Cobalt 60 unit that utilized live radioactive cobalt and that plaintiff would be expected to operate; and that plaintiff repeatedly requested that he not be required to operate the cobalt unit and that he be transferred out of the X-ray department for the reason that the cobalt unit was not properly operated and could cause serious and permanent injury. He alleged that cobalt 60 is a live source of radioactivity; that its safe handling requires more training than plaintiff was given; and that a Nuclear Regulatory Commission investigation disclosed a number of inadequacies and violations of regulations published in designated paragraphs of the Federal Register. Plaintiff also alleged that defendant refused to grant his request for transfer from the X-ray department and, in retaliation for his refusal to work with the cobalt unit, discharged him. He alleged, too, that the discharge was in contravention of the public policy of the State of Illinois and resulted from his employer's violation of federally mandated safety codes.

In count VI, plaintiff, Judith A. Wheeler, made substantially the same allegations, and further alleged that she had been deprived of plaintiff's services, society, companionship, and his conjugal relationship, and sought damages therefor.

In affirming the judgment, the appellate court, citing *Palmateer v. International Harvester Co.* (1981), 85 Ill.2d 124, 52 Ill.Dec. 13, 421 N.E.2d 876, held that to state a cause of action for the tort of retaliatory discharge requires that it be alleged in the complaint that the employee was discharged in retaliation for his activities, and that the discharge was in contravention of a clearly mandated public policy. The appellate court concluded that plaintiff William Wheeler was not attempting to remedy any possible rule violations, nor could they have played any part in his discharge, and therefore the clearly mandated public policy required under *Palmateer* was not present.

[**1, 2**] Because the order was entered upon allowance of a motion to dismiss, all facts properly pleaded must be taken as true. (*Fitzgerald v. Chicago Title & Trust Co.* (1978), 72 Ill.2d 179, 187, 20 Ill.Dec. 581, 380 N.E.2d 790.) In determining the sufficiency of the dismissed counts, we must apply the rule that no cause of action should be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle plaintiff to recover. *Fitzgerald v. Chicago Title & Trust Co.* (1978), 72 Ill.2d 179, 187, 20 Ill.Dec. 581, 380 N.E.2d 790; *Fechtner v. Lake County Savings & Loan Association* (1977), 66 Ill.2d 128, 5 Ill.Dec. 252, 361 N.E.2d 575.

It is plaintiffs' contention that the enactment of Federal legislation and the promulgation of regulations, violations of which are alleged in the complaint, enunciate a clearly mandated public policy to be uniformly enforced throughout the United States. They argue that the complaint alleged that Mr. Wheeler was discharged in retaliation for his refusal to work in the face of these violations and that the complaint stated a cause of action. It is defendant's position that because the complaint alleged no communication to the appropriate authorities of plaintiffs' claims of violation of the regulations, the controversy remained an internal matter between employer and employee and no public policy question was involved.

[**3, 4**] The control of radioactive material was preempted by the enactment of the Atomic Energy Act of 1954 (42 U.S.C.

sec. 2011 *et seq.* (1982); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Com.* (1983), 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752; *Illinois v. Kerr-McGee Chemical Corp.* (7th Cir.1982), 677 F.2d 571), and the congressional findings (42 U.S.C. sec. 2012 (1982)) and declaration of policy (42 U.S.C. sec. 2011 (1982)) clearly enunciate a public policy which is national in scope.

Although not briefed or argued by the parties, we have, *sua sponte*, raised the question whether under the provisions of section 210 of the Energy Reorganization Act (42 U.S.C. sec. 5851 (1982)) the preemption is so extensive as to preclude the bringing of this action. Section 5851, in pertinent part, provides:

> "(a) Discrimination against employee
>
> No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. sec. 2011 *et seq.*], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (2) testified or is about to testify in any such proceeding or;
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. sec. 2011 *et seq.*].

(b) Complaint, filing and notification

(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the 'Secretary') alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission.

(2)(A) * * *

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued." 42 U.S.C. secs. 5851(a), (b) (1982).

[5] Even in legislation in which Congress has not totally displaced State regulation in a specific area, State law is preempted to the extent that it actually conflicts with Federal law or if it stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. (*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.* (1983), 461 U.S. 190, 103 S.Ct. 1713, 75

L.Ed.2d 752.) In *Pacific Gas & Electric* the Supreme Court held that a primary purpose of the Atomic Energy Act is the promotion of nuclear power and that a California statute conditioning, as a matter of economic policy, construction of additional nuclear power plants on findings of the State Energy Commission that adequate means of disposal exist for nuclear waste did not so frustrate the Atomic Energy Act's purpose to develop the commercial use of nuclear power as to be pre-empted by the Act. In *Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443, the Supreme Court rejected the contention that an award for punitive damages in an action based on Oklahoma law conflicted with Congress' express intent to preclude dual regulation of radiation hazards. The court concluded that it was not inconsistent to vest the Nuclear Regulatory Commission with exclusive regulatory authority over the safety aspects of nuclear development and at the same time permit the plaintiffs to recover for injuries caused by nuclear hazards, and that the award of punitive damages was not preempted by Federal law.

[**6**] Under the provisions of section 5851 an employee may be reinstated in his employment and recover compensatory damages, but no provision is made for punitive damages. In *Midgett v. Sackett-Chicago, Inc.* (1984), 105 Ill.2d 143, 85 Ill.Dec. 475, 473 N.E.2d 1280, it was held that a wrongfully discharged employee whose employment was covered by a collective-bargaining agreement providing for grievance procedures was not required to exhaust those procedures prior to bringing an action for the tort of retaliatory discharge. The court reasoned that such an employee had a cause of action in tort independent of any contract remedy which may have been based on the collective-bargaining agreement. Citing *Kelsay v. Motorola, Inc.* (1978), 74 Ill.2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353, the court held that he was not limited to the remedies provided in the collective-bargaining agreement and could seek to recover punitive damages. We find the situation here analogous to *Silkwood* and conclude that it was not the congressional intent to preempt the field.

[7] Although somewhat inartfully stated, the complaint alleged that plaintiff was discharged in retaliation for his refusal to work in the handling of cobalt 60 while the operations were being conducted in violation of regulations promulgated by the Nuclear Regulatory Commission and published in the Federal Register. We do not agree with the appellate court that the question whether the facts as alleged involved public policy, or a matter of private concern, depended upon whether a complaint was made to the regulatory authorities. The legislation and the regulations declared the public policy, and the existence of that public policy did not depend upon whether plaintiff had communicated a complaint to the Nuclear Regulatory Commission or whether its investigation preceded or followed that complaint.

[8] We note that the circuits are not in agreement on the question whether the provisions of section 5851 protect an employee from retaliation based on internal safety complaints or whether participation in a proceeding is required. In *Consolidated Edison Co. of New York, Inc. v. Donovan* (2d Cir.1982), 673 F.2d 61, the court denied the petition for review of an order directing the reinstatement of an employee who had been discharged because he had made numerous complaints about safety at the nuclear power plant where he was employed. There is nothing in the opinion to indicate that he had participated in a proceeding for the enforcement of the Act. In *Mackowiak v. University Nuclear Systems, Inc.* (9th Cir.1984), 735 F.2d 1159, the court sustained the Secretary of Labor's conclusion that section 5851 protects employees from retaliation based on internal-safety and quality-control complaints. In *Brown & Root, Inc. v. Donovan* (5th Cir.1984), 747 F.2d 1029, the court held that the statute does not protect the filing of purely internal quality-control reports, but is designed to protect "whistle blowers" who provide information to governmental entities. The Supreme Court has not addressed the question whether section 5851 applies to purely internal complaints.

Plaintiffs have alleged that William Wheeler was discharged in violation of a clearly mandated public policy. In

Palmateer v. International Harvester Co. (1981), 85 Ill.2d 124, 52 Ill.Dec. 13, 421 N.E.2d 876, it was held that a cause of action for retaliatory discharge existed because the plaintiff was discharged for informing a local law enforcement agency that a co-worker may have committed a criminal violation. In *Palmateer* the court said, "There is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens." (85 Ill.2d 124, 132, 52 Ill.Dec. 13, 421 N.E.2d 876.) The protection of the lives and property of citizens from the hazards of radioactive material is as important and fundamental as protecting them from crimes of violence, and by the enactment of the legislation cited, Congress has effectively declared a clearly mandated public policy to that effect. We hold, therefore, that counts III and VI stated a cause of action for retaliatory discharge for refusing to work under conditions which contravened the clearly mandated public policy, and the circuit court erred in dismissing them.

The parties have limited their arguments to the sole question whether counts III and VI stated a cause of action for retaliatory discharge. They have not briefed or argued, and we do not decide, assuming that plaintiffs prevail in this cause, what elements of damage are recoverable, or whether any of the damages sought in count VI may be recovered as the result of the alleged wrongful discharge of William Wheeler. We decide only the narrow issue presented, and in holding that the counts erroneously dismissed stated a cause of action for retaliatory discharge, we do not imply any opinion concerning the damages.

For the reasons stated, the judgments of the appellate and circuit courts are reversed and the cause is remanded to the circuit court of Macon County for further proceedings consistent with this opinion.

Judgments reversed; cause remanded.

MILLER, J., took no part in the consideration or decision of this case.

MORAN, JUSTICE, dissenting:

The plaintiff in this case brought a common law action for retaliatory discharge instead of pursuing the remedies provided for in section 210 of the Energy Reorganization Act of 1974 (42 U.S.C. sec. 5851 (1982)). I disagree with the conclusion that plaintiff's cause of action is not preempted by Federal law. Moreover, I find no justification for extending the tort of retaliatory discharge to cases where, as here, existing remedies adequately protect the employee's interest in earning a livelihood and the public's interest in safety. Therefore, in addition to finding that plaintiff's cause of action is preempted by section 210, I would hold as a matter of law that plaintiff's remedy lies solely under section 210.

The preemption doctrine has its basis in the supremacy clause of the Federal Constitution (U.S. Const., art. VI, cl. 2). The doctrine provides that when Congress has legislated on a given subject, concurrent State law may be preempted by the Federal law. (See generally *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 229-31, 67 S. Ct. 1146, 1151-53, 91 L.Ed. 1447, 1459; *Hines v. Davidowitz* (1941), 312 U.S. 52, 68, 61 S. Ct. 399, 404-05, 85 L.Ed. 581, 587.) In order to determine if a State law has been preempted, the courts must examine the congressional intent behind an enactment. Congress' intent to preempt concurrent State law in a given area may be express or implied. (*Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238, 238, 104 S.Ct. 615, 621, 78 L.Ed.2d 443, 452; *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Com.* (1983), 461 U.S. 190, 203-04, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752, 765.) The Supreme Court in *Fidelity Federal Savings & Loan Association v. De la Cuesta* (1982), 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664, explained:

> "Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' * * * Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because '[t]he scheme of federal regulation may be so pervasive as to make reasonable the

> inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.' * * *
>
> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' * * * or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' * * *." (458 U.S. 141, 152-53, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664, 675.)

See also *Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443.

The majority opinion acknowledges that section 210 of the Energy Reorganization Act of 1974 (42 U.S.C. sec. 5851 (1982)), sometimes referred to as the "whistle blower" protection statute, affords protection to employees who believe that they have been discharged or discriminated against because they have testified, given evidence, or reported violations of Federal nuclear safety standards. The type of employee conduct protected by the statute is broadly described. Some courts have held that the protections of section 210 apply to retaliatory employment action resulting from purely internal company disputes over radiation safety. (See *Mackowiak v. University Nuclear Systems, Inc.* (9th Cir.1984), 735 F.2d 1159; *Consolidated Edison Co. v. Donovan* (2nd Cir.1982), 673 F.2d 61. Contra, *Brown & Root, Inc. v. Donovan* (5th Cir.1984), 747 F.2d 1029.) No formal proceedings need to be initiated against the employer as a result of an employee's assistance or participation in order for the employee to be protected by section 210. See 10 C.F.R. sec. 30.7(a)(2) (1985).

Section 210 is enforced by the United States Secretary of Labor. Employees who believe that they have been discharged or discriminated against in violation of section 5851(a) may file a complaint with the Secretary within 30 days after such violation occurs. (42 U.S.C. sec. 5851(b)(1).) The Secretary then investigates the complaint to determine if a violation occurred. If the Secretary finds a violation, he may award appropriate relief, including reinstatement of the employee to his former position, together with compensation (including back pay), terms and privileges of his employment; compensatory damages; and reasonable legal costs, including attorney fees and expert witness fees. (42 U.S.C. sec. 5851(b)(2)(B). See generally *DeFord v. Secretary of Labor* (6th Cir.1983), 700 F.2d 281; *Ellis Fischel State Cancer Hospital v. Marshall* (8th Cir.1980), 629 F.2d 563, *cert. denied* (1981), 450 U.S. 1040, 101 S.Ct. 1757, 68 L.Ed.2d 237.) The Secretary's orders are reviewable by the United States court of appeals. (42 U.S.C. sec. 5851(c)(1).) In addition, enforcement of the Secretary's order may be initiated by the employee by filing suit in Federal district court. 42 U.S.C. sec. 5851(e).

There is no doubt that the regulation of the safety aspects of nuclear energy has been predominately a matter of Federal concern. (*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Com.* (1983), 461 U.S. 190, 211-12, 103 S.Ct. 1713, 1726, 75 L.Ed.2d 752, 770.) The purpose of section 210 is to encourage "employees and union officials [to] help assure that employers do not violate requirements of the Atomic Energy Act." (42 U.S.C. sec. 5851, 1978 U.S. Code Cong. and Adm. News 7304.) Thus, section 210 touches on an area traditionally governed by Federal law.

In addition, section 210 represents just a part of the comprehensive and pervasive Federal regulatory scheme on nuclear energy. The statute here defines the class of individuals and entities subject to its prohibitions, defines the prohibited conduct, enumerates several and specific remedies available to employees, and provides for a detailed administrative and judicial process whereby aggrieved employees can seek redress

for violations of the statute. A more comprehensive statute could hardly be imagined.

The fact that the regulation of the safety aspects of nuclear development has traditionally and almost exclusively been a matter of Federal not State concern, the pervasiveness of the Federal regulation of nuclear safety, and the comprehensive nature of the Federal "whistle blower" protection statute makes "'reasonable the inference that Congress left no room for the States to supplement it.'" (*Fidelity Federal Savings & Loan Association v. De la Cuesta* (1982), 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664, 675.) I would hold that plaintiff's cause of action is preempted by section 210.

The majority opinion, in holding that section 210 does not preempt plaintiff's common law cause of action for retaliatory discharge, relies primarily on *Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443. In that case, the plaintiff brought a common law tort action for injuries received by his decedent as the result of being contaminated by plutonium at defendant's plant. The Supreme Court held that the award of punitive damages based on Oklahoma law was not preempted by the Atomic Energy Act of 1954 (42 U.S.C. secs. 2011 through 2284 (1976 ed. and Supp. V)). Today's opinion, in addressing the preemption issue, simply states: "We find the situation here analogous to *Silkwood* and conclude that it was not the congressional intent to preempt the field." (108 Ill.2d at 509, ____ Ill.Dec. ____, 485 N.E.2d 376.) The reliance on the *Silkwood* case is misplaced. The Supreme Court in *Silkwood* found express language in the Price-Anderson Act (42 U.S.C. sec. 2210 (1982)), an amendment to the Atomic Energy Act, which clearly indicated that State tort remedies for persons injured by nuclear accidents were, with certain exceptions, not preempted. (464 U.S. 238, ____, 104 S.Ct. 615, 623, 78 L.Ed.2d 443, 454-55. See generally Comment, *Federal Preemption of the State Regulation of Nuclear Power: State Law Strikes Back* (1984), 60 Chi.-Kent L.Rev. 989, 1004-05.) Unlike the clear expression of congressional intent found in the language and history of the Price-Anderson Act, Congress has

not expressly allowed for State tort remedies in section 210 of the Energy Reorganization Act of 1974. Moreover, the court in *Silkwood* found the absence of a Federal remedy to be significant. The court observed that it "is difficult to believe that Congress would * * * remove all means of judicial recourse for those injured by illegal conduct." (464 U.S. 238, 104 S.Ct. 615, 623, 78 L.Ed.2d 443, 454.) Here, by contrast, Congress has provided plaintiff with a Federal remedy.

Furthermore, the impetus for this court's recognition of the tort of retaliatory discharge was the lack of any remedy available to employees in situations where they were discharged in "contravention of a clearly mandated public policy." (*Palmateer v. International Harvester Co.* (1981), 85 Ill.2d 124, 134, 52 Ill.Dec. 13, 421 N.E.2d 876). In *Kelsay v. Motorola, Inc.* (1978), 74 Ill.2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353, this court recognized a cause of action for retaliatory discharge where a worker had been discharged for filing a workers' compensation claim. In so doing, the court reasoned that such an action was necessary in order to insure that at-will employees would be able to freely exercise their rights under the Workers' Compensation Act (Ill.Rev.Stat.1981, ch. 48, par. 138.1 *et seq.*) In *Palmateer*, a majority of this court recognized a cause of action for retaliatory discharge where an employee alleged he was fired for supplying information to local law-enforcement officials concerning the possible criminal involvement of a fellow employee. Again, the rationale of the majority was that no remedy existed to protect an employee who was discharged for engaging in conduct which promoted the public policy favoring "citizen crime-fighters." (*Palmateer v. International Harvester Co.* (1981), 85 Ill.2d 124, 132, 52 Ill.Dec. 13, 421 N.E.2d 876.) The court stated:

> "With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic. [Citation.] In addition, unchecked employer power, like unchecked employee power, has been seen to present a distinct threat to the

> public policy carefully considered and adopted by society as a whole. As a result, it is now recognized that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out." (85 Ill.2d 124, 129, 52 Ill.Dec. 13, 421 N.E.2d 876.)

Even in *Midgett v. Sackett-Chicago, Inc.* (1984), 105 Ill.2d 143, 85 Ill.Dec. 475, 473 N.E.2d 1280, a case in which I wrote a dissent, a majority of this court held that a cause of action for retaliatory discharge existed because they believed such an action was "necessary" in order to provide employees covered by a collective bargaining agreement with a "complete remedy." 105 Ill.2d 143, 149, 85 Ill.Dec. 475, 473 N.E.2d 1280.

When the tort of retaliatory discharge is placed in its proper historical perspective, it is difficult to justify today's decision. Based on the record before the court, there is no indication that section 210 is inapplicable to the present case. The record indicates that defendant is licensed by the Nuclear Regulatory Commission and the employment dispute involves allegations of Federal radiation safety standards. Moreover, there is no indication that the remedy afforded by section 210 is inadequate to protect both the public's interest in safety and the employee's interest in earning a livelihood. Certainly Congress considered all the competing policies involved when it enacted section 210. (See 42 U.S.C. sec. 5851, 1978 U.S. Code Cong. and Adm. News 7303-04.) Thus, irrespective of whether today's action is preempted by Federal law, I do not think that this court should intrude into an area already regulated by a comprehensive Federal statute.

Courts in other jurisdictions have refused to recognize a cause of action for retaliatory discharge in circumstances where employees have adequate statutory or administrative remedies available to them. (See, *e.g.*, *Corbin v. Sinclair Marketing, Inc.* (Colo.App. 1984), 684 P.2d 265; *Ohlsen v. DST Industries, Inc.* (1981), 111 Mich. App. 580, 314 N.W.2d 699; *Davis v. Boise Cascade Corp.* (Minn.1979), 288 N.W.2d 680; *Walsh v. Con-*

solidated Freightways, Inc. (1977), 278 Or. 347, 563 P.2d 1205; *Brudnicki v. General Electric Co.* (N.D. Ill.1982), 535 F.Supp. 84.) I find these cases persuasive, and would hold as a matter of State common law that plaintiff does not have a cause of action for retaliatory discharge.

In addition, I disagree with the conclusion that plaintiffs' complaint states a cause of action for retaliatory discharge. In my opinion the complaint does not allege facts sufficiently setting forth the elements of the cause of action. The majority opinion states: "[T]he complaint alleged that plaintiff was discharged in retaliation for his refusal to work in the handling of cobalt 60 *while the operations were being conducted in violation of regulations promulgated by the Nuclear Regulatory Commission* and published in the Federal Register." (Emphasis added.) (108 Ill.2d at 509, ____ Ill.Dec. ____, 485 N.E.2d 376.) That statement is incorrect.

The complaint only alleged that plaintiff was discharged for his "reasonable refusal to work with the Cobalt 60 Unit," and that the unit was "not operated properly and could cause serious and permanent injury." The complaint also alleged that an investigation by the Nuclear Regulatory Commission disclosed certain specified inadequacies in defendant's radiation-safety program. However, it did not, as the majority opinion suggests, allege that any violations existed at the time plaintiff was discharged, or that plaintiff was required to work with the unit while defendant's program was in violation of Federal safety standards. As the appellate court in this case correctly observed, the allegations of unsafe conditions "must be viewed as of the time of plaintiff's discharge, which was on August 20, 1979. The record reveals that the investigations by the NRC occurred on October 12, 1979, and March 11, 1981. There is no indication in the record that any investigation was contemplated nor pending on the date of plaintiff's discharge." 123 Ill.App.3d 539, 544-45, 78 Ill.Dec. 908, 462 N.E.2d 1262.

Although pleadings are to be liberally construed and formal or technical allegations are not necessary, a complaint must, nevertheless, contain facts necessary to state a cause of action. (*People ex rel. Scott v. College Hills Corp.* (1982), 91 Ill.2d 138, 145, 61 Ill.Dec. 766, 435 N.E.2d 463; *Fanning v. LeMay* (1967), 38 Ill.2d 209, 211, 230 N.E.2d 182.) A complaint fails to state a cause of action when it omits facts, the existence of which are necessary for plaintiff to recover. (*Ritchey v. Maksin* (1978), 71 Ill.2d 470, 474-75, 17 Ill.Dec. 662, 376 N.E.2d 991.) Assuming, *arguendo*, that discharge of an employee for refusal to work in handling cobalt 60 while the operations violated Federal safety standards states a claim for retaliatory discharge, plaintiffs' complaint did not allege sufficient facts showing that to be the case.

For the reasons stated, I must respectfully dissent.

RYAN, J., joins in this dissent.

APPENDIX B

123 Ill.App.3d 539
78 Ill.Dec. 908

William E. WHEELER and Judith A. Wheeler, Plaintiffs-Appellants,

v.

CATERPILLAR TRACTOR COMPANY, a California Corporation authorized to do business in Illinois, Defendant-Appellee.

No. 4-83-0606.

Appellate Court of Illinois,
Fourth District.

April 17, 1984.

Former employee and his wife brought action against former employer, alleging retaliatory discharge and intentional infliction of severe emotional distress. The Circuit Court, Macon County, Donald W. Morthland, J., granted employer's motion to dismiss, and plaintiffs appealed. The Appellate Court, Webber, J., held that complaint filed by former at-will employee failed to state cause of action against former employer for retaliatory discharge, because, at the time of employee's discharge, there was no hard evidence of unsafe conditions at the place of employment but only employee's unilateral and subjective decision that such conditions did exist, and thus employee, who was discharged for refusing to work in conditions which he alleged were unsafe, could point to no articulation of a clear or well-defined public policy that was contravened as the result of his discharge.

Affirmed and remanded.

1. Pretrial Procedure

To prove that trial court abused its discretion in permitting

defendant to withdraw its answer and file a motion to dismiss in its place, plaintiffs were required to show that they were somehow prejudiced by the late filing of defendant's motion. S.H.A. ch. 110, ¶¶ 2-615, 2-615(e).

2. Pretrial Procedure

Trial court did not abuse its discretion in permitting defendant to withdraw its answer and file a motion to dismiss in its place, despite fact that nearly two years passed between the filing of defendant's answer and its motion to substitute a motion to dismiss, in absence of showing of any prejudice as result of defendant's tardy motion. S.H.A. ch. 110 ¶¶ 2-615, 2-615(e).

3. Appeal and Error

Any contention that trial court erred in dismissing prayers for punitive damages in two counts of plaintiffs' complaint was waived by plaintiffs' failure to argue that point on appeal. S.H.A. ch. 110A, ¶ 341(e)(7).

4. Pretrial Procedure

To withstand a motion to dismiss, complaint must allege facts sufficiently setting forth the essential elements of the cause of action, and in ruling upon motion to dismiss, circuit court may consider the pleadings, affidavits in support of the motion, answers to interrogatories, and deposition evidence; if facts alleged demonstrate any possibility of recovery, the order of dismissal will be reversed.

5. Master and Servant

To state a cause of action for retaliatory discharge, all that is required is that employer discharge employee in retaliation for employee's activities, and that the discharge be in contravention of clearly mandated public policy.

6. Master and Servant

Complaint filed by former employee failed to state cause of action against former employer for retaliatory discharge, because, at the time of employee's discharge, there was no hard evidence of unsafe conditions at the place of employment but only employee's unilateral and subjective decision that such conditions did exist, and thus employee, who was discharged for refusing to work in conditions which he alleged were unsafe, could point to no articulation of a clear or well-defined public policy that was contravened as the result of his discharge.

Bennett, Willoughby & Latshaw, P.C., Decatur, for plaintiffs-appellants; K. Michael Latshaw, Decatur, of counsel.

Hull, Campbell & Robinson, Decatur, for defendant-appellee; Michael I. Campbell, Jon D. Robinson, Decatur, of counsel.

WEBBER, Justice:

The plaintiffs (husband and wife), filed their six-count complaint against the defendant (husband's former employer) alleging retaliatory discharge and the intentional infliction of severe emotional distress along with accompanying counts for loss of consortium. The defendant filed an answer to the complaint. The circuit court then allowed the defendant to withdraw its answer and to file a motion to dismiss in its place. The court subsequently ruled in favor of the defendant on its motion to dismiss. On appeal, plaintiffs contend that the circuit court erred in allowing the defendant to withdraw its answer and to substitute a motion to dismiss. The plaintiffs also claim that, in any event, the court's order granting the motion to dismiss was error because their complaint did state a cause of action for retaliatory discharge as a matter of law. We affirm.

The facts, in brief, as gleaned from the complaint suggest that the plaintiff-husband was discharged by the defendant company on August 29, 1979, after having been employed by it since 1955. At the time of his discharge, the plaintiff was an

"at-will" employee engaged in quality control testing for the defendant. He worked regularly with electrically generated radiation in the X-ray department. In 1979 this department switched to a live source of radiation called a Cobalt 60 Unit. At this time the plaintiff repeatedly requested that he be transferred out of this department because he felt that the cobalt 60 unit was not being operated properly and because he feared for his safety. The defendant, however, did not allow the plaintiff to transfer. Consequently, the plaintiff refused to work with the Cobalt 60 Unit and the defendant discharged him.

The plaintiffs filed their complaint on May 12, 1981. Counts I and II alleged that the defendant's wilful and wanton conduct caused the plaintiff-husband severe emotional distress. Compensatory and punitive damages were requested in these counts. Count III alleged that the discharge violated public policy and contained a request for compensatory and punitive damages for the plaintiff-husband. Counts IV and V requested compensatory damages only for the plaintiff-wife as a result of her loss of consortium caused by defendant's infliction of severe emotional distress upon her husband. Count VI alleged violation of public policy and requested compensatory damages for the wife for her loss of consortium caused by the defendant's alleged retaliatory discharge of her husband.

The defendant filed an answer to the complaint on June 11, 1981, and discovery was initiated. The case was originally set for trial on June 20, 1983; however, the plaintiffs filed a motion on May 5, 1983, seeking an indefinite continuance of the cause. On May 13, 1983, the defendant filed a motion to withdraw its answer and to file, in lieu thereof, a motion to dismiss. On June 10, 1983, the court granted the motion to continue and allowed the defendant to replace its answer with a motion to dismiss. The motion asked that counts III and VI be dismissed for failure to state a cognizable cause of action and that counts I and II be dismissed because they contained insufficient allegations to support prayers for punitive damages.

In its order of August 24, 1983, the court dismissed counts III and VI for failing to state a cause of action. The court also dismissed the prayers for punitive damages in counts I, II, IV, and V, although counts IV and V contained no such prayers. The court then found that there was no reason to delay appeal pursuant to Supreme Court Rule 304(a) (87 Ill.2d R. 304(a)).

On appeal the plaintiffs first argue that the circuit court erred in permitting the defendant to withdraw its answer and to file a motion to dismiss in its place. The defendant's original answer was filed on June 11, 1981. Nearly two years later on May 13, 1983, the defendant filed its motion to withdraw its answer and to substitute a motion to dismiss. The plaintiffs contend that this time span and the amount of discovery conducted in the meantime make the court's decision an abuse of discretion.

[1] The parties here agree that the defendant's motion should be governed by section 2-615 of the Code of Civil Procedure (Ill.Rev.Stat.1981, ch. 110, par. 2-615), formerly section 45 of the Civil Practice Act. That section places no specific time limit for the filing of a motion with respect to pleadings. Subsection (e) does state that any party "may seasonably move" for a judgment on the pleadings. Illinois courts have construed this section to give circuit courts the discretion to allow the filing of late pleadings. In *Illinois Housing Development Authority v. Sjostrom & Sons, Inc.* (1982), 105 Ill.App.3d 247, 253-54, 61 Ill.Dec. 22, 27, 433 N.E.2d 1350, 1355, the court stated:

> "There is very little case law concerning the time period in which motions to dismiss can be filed. In *Greenlee Brothers & Co. v. Rockford Chair & Furniture Co.* (1969), 107 Ill.App.2d 326, 332-33 [246 N.E.2d 64], however, this court did state that the trial court has discretion to permit the filings of tardy pleadings, and unless plaintiff can show that it was prejudiced by the late filing there is no abuse of discretion. See also *Silberstein v. Joos* (1978), 59 Ill.App.3d 293 [16 Ill.Dec 707, 375

N.E.2d 580]; *McGrath Heating & Air Conditioning Co. v. Gustafson* (1976), 38 Ill.App.3d 465 [348 N.E.2d 223].

Because this court can view the joint motion to dismiss as a section 45 motion, because section 45 does not refer to a time period in which such motions must be brought, and because plaintiff has failed to establish that it has been prejudiced by the late filing of the joint motion, the trial court did not abuse its discretion in ruling on the joint motion to dismiss, notwithstanding the fact that several of the moving defendants had previously filed answers to the complaint."

Likewise, the Illinois Supreme Court has stated that the "objection that the complaint does not state a cause of action * * may be raised at any time, either before or after judgment." (*Krachock v. Department of Revenue* (1949), 403 Ill. 148, 153, 85 N.E.2d 682, 685, *appeal dismissed*, 338 U.S. 804, 70 S.Ct. 72, 94 L.Ed. 487.) Therefore, to prove that the court here abused its discretion the plaintiffs must show that they were somehow prejudiced by the late filing of the defendant's motion.

[2] The plaintiffs do not allege any specific prejudice that they have suffered as a result of the defendant's tardy motion. They merely allege that the ends of justice cannot be served by allowing the motion after nearly two years of preparing for trial. This general allegation must be considered in the light of the plaintiff's own request for a continuance of the trial, filed only eight days before the defendant's motion to withdraw its answer. Since the plaintiffs sought, and were granted, an indefinite delay in the proceedings, it is not likely that they were prejudiced by the tardy filing of the defendant's motion to withdraw its answer. Since the plaintiffs have failed to show any prejudice we cannot say that the court's decision to allow the tardy motion was an abuse of discretion.

[3] The plaintiffs next contend that even if the motion to dismiss were properly filed, the circuit court erred in granting it. They claim that counts III and VI of their complaint did state a cause of action based upon the tort of retaliatory discharge.

However, any contention that the court erred in dismissing the prayers for punitive damages in counts I and II has been waived by the plaintiffs' failure to argue this point on appeal. See Supreme Court Rule 341(e)(7) (87 Ill.2d R. 341(e)(7)).

[4] To withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. In ruling upon a motion to dismiss the circuit court may consider the pleadings, affidavits in support of the motion, answers to interrogatories, and deposition evidence. (*Gaudynski v. Corbett* (1980), 81 Ill.App.3d 910, 37 Ill.Dec. 125, 401 N.E.2d 1218.) If the facts alleged demonstrate any possibility of recovery, the order of dismissal will be reversed.

[5] With the decision of *Kelsay v. Motorola, Inc.* (1978), 74 Ill.2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353, Illinois joined the growing number of states recognizing the tort of retaliatory discharge. This tort is an exception to the general rule that an "at-will" employee may be discharged at any time for any cause. To state a cause of action for retaliatory discharge "[a]ll that is required is that the employer discharge the employee in retaliation for the employee's activities, and that the discharge be in contravention of a clearly mandated public policy." *Palmateer v. International Harvester Co.* (1981), 85 Ill.2d 124, 134, 52 Ill.Dec. 13, 18, 421 N.E.2d 876, 881.

In the present case, the complaint states that the plaintiff-husband was discharged because of his refusal to work with allegedly unsafe equipment. The complaint also alleges the defendant's operation of the Cobalt 60 Unit violated several Nuclear Regulatory Commission rules. The complaint then states that the discharge of the plaintiff-husband was in contravention of the public policy of Illinois in that a worker should not be discharged for refusing to work with allegedly unsafe equipment. It is clear from the complaint that the plaintiff was discharged in retaliation for certain activities. Thus the issue to be resolved is whether the plaintiffs have sufficiently alleged that the discharge was in violation of a clear public policy.

There are no Illinois court decisions discussing public policy under similar factual circumstances. In *Kelsay*, the supreme court held that discharging an employee for filing a workmen's compensation claim violated the clear public policy enunciated in the Workers' Compensation Act (Ill.Rev.Stat. 1973, ch. 48, par. 138.1, *et seq.)*. In *Palmateer*, the supreme court held that discharging an employee for assisting the police in the investigation and prosecution of suspected crimes violates the clear public policy in favor of the enforcement of the criminal code of Illinois.

In its *Palmateer* decision, the supreme court sought to determine the contours of the tort of retaliatory discharge. In doing so, the court stated that an employer retains the right to fire workers at will in cases where no clear mandate of public policy is involved. The court then discussed the definition of public policy and stated:

> "In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions. *(Smith v. Board of Education* (1950), 405 Ill. 143, 147 [89 N.E.2d 893].) Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed." (*Palmateer*, 85 Ill.2d 124, 130, 52 Ill.Dec. 13, 15-16, 421 N.E.2d 876, 878-79.)

The court went on to list a number of decisions from other jurisdictions upholding the tort of retaliatory discharge for such things as refusing to commit perjury; refusing to engage in price fixing; refusing to violate a consumer credit code; refusing to practice medicine without a license; refusing to evade jury duty; engaging in statutorily protected union activities; and for filing a workers' compensation claim. On the other hand, the action had not been allowed where a worker disputed a company's

internal management system; took too much sick leave; tried to examine the company's books in a shareholder capacity; impugned the company's integrity; refused to be examined by a psychological-stress evaluator; or used the employer's Christmas fund improperly.

In summary, the supreme court noted that the action had been allowed where the public policy was clear. However, the action was denied where it was clear that only private interests were at stake. The court then observed that where the interest at stake is less than clear, the courts of other jurisdictions have given conflicting answers. In this list, the court included the situation where an employee is discharged for internal disputes regarding product safety. This situation appears closest to the circumstances in the present case.

While the supreme court expressed no view as to the less-than-clear areas, it did cite *Pierce v. Ortho Pharmaceutical Corp.* (1979), 166 N.J.Super. 335, 399 A.2d 1023, and *Geary v. United States Steel Corp.* (1974), 456 Pa. 171, 319 A.2d 174, as cases dealing with the situation where an employee was discharged for challenging the safety of the company's products. In *Pierce* the court held that this factual situation may state a cause of action and it remanded the case for further factual development. In *Geary* the court held that this type of internal dispute did not involve clear public policy and affirmed the lower court's dismissal of the complaint.

[6] In determining which side of the line the allegations in the present complaint should fall upon, it is important to note that the facts here involve less indicia of public policy than those in *Pierce* and *Geary*. Those cases dealt with an employee voicing concerns to his superiors about possible defects in the employer's products. These products were being sold to the public. On the other hand, we deal here with an employee who was discharged because he maintained that the equipment for his job was possibly unsafe.

To sustain his position, plaintiff alleged in his complaint that an investigation by the United States Nuclear Regulatory Commission (NRC) had found inadequacies in the defendant's radiation safety program. These allegations must be viewed as of the time of plaintiff's discharge, which was on August 20, 1979. The record reveals that the investigations by the NRC occurred on October 12, 1979, and March 11, 1981. There is no indication in the record that any investigation was contemplated nor pending on the date of plaintiff's discharge.

Moreover, we have examined those reports and they do not reveal that any inadequacies were of a life-threatening nature. Briefly summarized, the report of October 12, 1979, found the following: (1) failure to post a certain notice; (2) a practice of padlocking the door to the radiographic facility during operations; (3) failure to keep survey records of radiation levels in unrestricted areas; (4) failure to calibrate two survey meters for more than three months; (5) maintaining utilization logs with less than all the information required; (6) maintaining a less than adequate daily record of dosimeter readings; (7) failure on 11 days to record radiation surveys to determine that the sealed source was in its shielded condition.

The report of March 11, 1981, states,

"No items of noncompliance or unsafe conditions were found."

It is thus apparent that on August 20, 1979, there was no hard evidence of unsafe conditions, but rather only plaintiff's unilateral and subjective decision that such conditions did exist. His position is therefore untenable.

The plaintiffs also rely on *Petrik v. Monarch Printing Corp.* (1982), 111 Ill.App.3d 502, 67 Ill.Dec. 352, 444 N.E.2d 588, to support their contentions. The employee in that case was fired for attempting to force his employer to comply with the Illinois criminal code. The court there found that the public policy in favor of the enforcement of criminal laws which was cited in *Palmateer* was also present in that case. While the plaintiffs can

point to no criminal violations here, they do allege violations of Nuclear Regulatory Commission rules. However, it is clear from the record that these violations were not discovered until an inspection more than one month after the plaintiff's dismissal. The plaintiff was not attempting to remedy any possible rule violations, nor could they have played a part in his discharge. The public policy found in *Palmateer* and *Petrik* is not present in this case.

As the court in *Pierce* noted, courts

> "must guard against a potential flood of unwarranted disputes and litigation that might result from such a doctrine, based on vague notions of public policy. Hence, if there is to be such an exception to the at-will employment rule, it must be tightly circumscribed so as to apply only in cases involving truly significant matters of clear and well-defined public policy and substantial violations thereof." (*Pierce*, 166 N.J.Super. 335, 342, 399 A.2d 1023, 1026.)

The plaintiffs here can point to no articulation of a clear or well-defined public policy that has been contravened. In the absence of this, we cannot say that the trial court erred in dismissing counts III and VI of their complaint.

Accordingly, the judgment of the circuit court of Macon County dismissing counts III and VI and the prayers for punitive damages in counts I and II is affirmed and the cause is remanded to that court for further proceedings.

Affirmed and remanded.

TRAPP and MILLER, JJ., concur.

APPENDIX C

IN THE CIRCUIT COURT
of the Sixth Judicial Circuit
Macon County, Illinois

WILLIAM E. WHEELER AND
JUDITH A. WHEELER,
individually,
Plaintiffs,

vs.

CATERPILLAR TRACTOR
COMPANY,
a California Corporation
authorized to do business in Illinois,
Defendant.

No. 81-L-71

ORDER

THIS CAUSE coming on for hearing this 5th day of August, 1983, the Plaintiff being present by counsel of choice, and the Defendant being present by counsel of choice, the Court having heard the arguments of counsel on the Defendant's Motion to Dismiss, and being otherwise advised in the premises:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That Counts Three and Six of the Plaintiff's Complaint are hereby dismissed and stricken and the Defendant's Motion to Dismiss is granted as to those counts, with prejudice, in that the Plaintiff cannot state a cause of action based upon the facts alleged in Count Three of his Complaint within the purview of *Petrik v. Monarch Printing Corporation*, 111 Ill. App. 3d 502 (First Dist. 1982); *Kelsay v. Motorola*, 74 Ill. 2d 172 (1978); and *Palmateer v. International Harvester*, 85 Ill. 2d 124 (1981).

2. That the prayer for punitive or exemplary damages contained in the Plaintiff's Counts One, Two, Four and Five are hereby dismissed and stricken pursuant to *Knierim v. Izzo*, 22 Ill. 2d 73 (1961).

3. That pursuant to Illinois Supreme Court Rule 304 (a), this Court expressly finds that there is no just reason for delaying appeal of this Order.

ENTERED: 8-24-83

_____

JUDGE

APPROVED AS TO FORM:

_____

CATERPILLAR TRACTOR CO.
Attorney for the Defendant

APPENDIX D

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

December 2, 1985

Hull, Campbell & Robinson
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P.O. Box 1765
Decatur, IL 62525

No. 60181— William E. Wheeler, et al., appellants, v. Caterpillar Tractor Company, etc., appellee. Appeal, Appellate Court, Fourth District.

The Supreme Court today *DENIED* the petition for rehearing in the above entitled cause. Miller, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 12, 1985.

APPENDIX E

No. 60181

IN THE

SUPREME COURT OF ILLINOIS

William E. Wheeler, et al., *Appellants* v. Caterpillar Tractor Company, etc. *Appellee*	Appeal Appellate Court Fourth District AC4-83-0606

ORDER

This matter has come for consideration upon the motion of appellee to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

HOWARD C. RYAN
Justice, Supreme Court of Illinois

Supreme Court, U.S.
FILED
MAR 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1457

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CATERPILLAR TRACTOR CO.,

Petitioner,

v.

WILLIAM WHEELER AND JUDITH WHEELER,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court of Illinois

---

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the state common law tort remedy of retaliatory discharge created by the Illinois Supreme Court is pre-empted by the Energy Reorganization Act, 42 U.S.C. Section 5851 (1982).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1457

CATERPILLAR TRACTOR CO.,

Petitioner,

v.

WILLIAM WHEELER AND JUDITH WHEELER,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS[1]

Respondents, William Wheeler and Judith Wheeler, respectfully pray that a Writ of Certiorari not issue to review a decision and order of the Illinois Supreme Court.

REASONS FOR DENYING THE WRIT

The Petitioner is requesting this court to conclude that Section 210 of the Energy Reorganization Act,

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[1] Ms. Wendy Welch, senior law student, Southern Illinois University, College of Law, assisted counsel in preparation of this brief, and who gratefully acknowledge her efforts.

42 U.S.C. Section 5851 (1982), pre-empts the Illinois common law tort of retaliatory discharge under the circumstances alleged by the respondent in his complaint originally filed in state court. In arguing that Congress has completely pre-empted all issues related to nuclear safety, the petitioner asserts that the Illinois Supreme Court in its decision below ignored the "broad pre-emptive sweep" of *Pacific Gas and Electric Company vs. State Energy Comm.*, 461 U.S. 190 (1983), and urges this Court to abandon the surgical analysis it employed in that decision as well as its decision in *Silkwood v. Kerr-McGhee Corp.*, 464 U.S. 238 (1984) in favor of an all encompassing pre-emptive fiat. In making this assertion, the petitioner concludes that only economic questions of energy generation have been ceded to the states. This conclusion cannot be reconciled with this court's analysis in *Silkwood, supra.*

I. THE ILLINOIS SUPREME COURT'S DECISION IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

The Energy Reorganization Act, was enacted by Congress to replace the Atomic Energy Act of 1954, transferring the regulatory scheme of that Act to various departments of the federal government and establishing the Nuclear Regulatory Commission (NRC) with enabling authority to promulgate regulations regarding the radiological aspects of nuclear reactor construction and operation. The overall purpose being to promote the civilian use of nuclear power and thereby remove the generation of nuclear energy from the federal government as a complete monopoly. Thus, while the federal government would continue to regulate radiological safety insofar as the

construction and operation of nuclear power plants are concerned, the states retained traditional responsibility of regulating utilities in determining questions of need, reliability, cost and other related state concerns. *Pacific Gas and Electric Co., v. State Energy Comm.*, 461 U.S. 190 (1983).

This Court did not paint with so broad a brush in *Pacific Gas* as to prevent California from enacting legislation imposing a moratorium on additional nuclear reactor construction within its boundaries until the state commission had made a determination that appropriate technology existed for the safe disposal of high level radiological waste material generated by these plants. This was in the area of traditional state responsibility regarding the need and reliability of certain aspects of nuclear energy generation found by this Court to have been retained by the states. In so doing, this Court reiterated its long held position that absent explicit pre-emptive language, Congress' intent to supercede state law may be found from a scheme of regulation so pervasive as to make reasonable the inference that there is no room to supplant it, or if not entirely displaced, pre-empted to the extent that state law conflicts with, creates a physical impossibility, or serves as a complete obstacle to the accomplishment of congressional purposes. *Id.* 461 U.S. at 204.

The Illinois Supreme Court in its decision below, found that Section 210 did not conflict with state tort law in that the action for retaliatory discharge, as applied to the facts of the respondent's complaint created a broader remedy than made available by that statute. It was not limited simply to "a whistle blower" within the meaning of that statute and fur-

ther, that it provided for additional punitive damages. Disagreeing with the Illinois Fourth District Appellate Court, the Illinois Supreme Court concluded that the respondent need not have made external complaint to the NRC prior to his discharge in order to state a cause of action for retaliatory discharge. Further, in enunciating the policy of the State of Illinois in this area, the Illinois Supreme Court reaffirmed punitive measures enforceable against the petitioner in the form of exemplary damages.

The all pervasive remedy argued by the petitioner as being available through Section 210 limits that remedy both in terms of class of persons protected as well as permissible result. In order to proceed under Section 210, an employee must assert that he commenced or caused to be commenced a proceeding under the Atomic Energy Act of 1954 as amended, testified or was about to testify in such a proceeding, or assisted in the participation in any manner in such a proceeding. This provision presupposes a proceeding in some form having already commenced or having been initiated by the employee. *Mackowiak v. Universal Nuclear Systems*, 735 F2d 1159 (9th cir. 1984). Additionally, the ascertainable result is limited to reinstatement, and compensation as well as attorney's fees and costs. There is no provision for punitive damages. This enforcement provision would not apply to the respondent in that there were no proceedings initiated prior to his termination, a fact relied upon by the petitioner in the courts below in its assertion that the respondent could not state a cause of action under Illinois state law.

The "broad pre-emptive sweep" relied upon by the petitioner also cannot be reconciled with this Court's

analysis in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). If the "*pre-emptive sweep*" of federal regulation of nuclear safety is as broad as professed by the petitioner, this Court could not have decided *Silkwood* in the manner that it did. Concluding from its analysis of the legislative history of the Price-Anderson Act, this Court stated:

> More importantly, the only congressional discussion concerning the relationship between the Atomic Energy Act and state court remedies indicates that Congress assumed such remedies would be available. *Id.* 464 U.S. at 251.

The authority granted to the NRC through the Energy Reorganization Act to set safety standards did not foreclose state tort remedies. Congress assumed the traditional principles of state tort law would apply.[2]

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[2] The indemnity scheme provided in the Price-Anderson Act as protection to the nuclear industry from state tort lawsuits, enacted in point of time prior to Section 210, not only assumes that persons injured would pursue state tort remedies, but that the notion of "injury" as a part of the state tort law, would be as broad as permitted by that states highest court of last resort. The Illinois Supreme Court's decision below permits those in the position of the respondent to assert a cause of action for an "injury" broader than that contemplated by Section 210. The legislative history for Section 210 provides, "this section does not apply to an employee who acts outside the direction of his employer." 6 U.S.C.C.A.N. 7303 (1978). There is no further reference anywhere in a legislative history that this remedy is exclusive under all circumstances and thereby completely preempting any state action.

II. THE ILLINOIS SUPREME COURT'S DECISION BELOW DOES NOT CREATE A CONFLICT REQUIRING RESOLUTION BY THIS COURT.

The petitioner argues that the Illinois Supreme Court has impermissibly intruded in an area this Court has already decided is federally pre-empted, and in so doing, has replaced congressionally established remedies contrary to an explicit congressional mandate. It argues that this creates a dangerous precedent for further excursions by state courts into other areas of nuclear safety regulations. In partial support for this position the petitioner cites six other federal regulatory schemes in which it claims there are similar employee protection provisions as that provided by Section 210. Two of these schemes employ language virtually identical to that of Section 210; [3] three others use language substantially similar[4] and one provides a general statement of policy only.[5] The best of these provisions, like Section 210, limits the scope of the remedy to those employees who make outside complaint or otherwise participate in a proceeding under those various acts and are limited to ordinary damages, reinstatement, attorneys fees and costs. To the extent that an employee is in the position of the respondent and not covered by these provisions, no conflict is presented in the enforcement of the federal

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[3] Toxic Substances Control Act, 15 U.S.C. Section 2622; Clean Air Act, as amended, 42 U.S.C. Section 7622.

[4] Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Section 1293; Federal Water Pollution Control Act, as amended, 33 U.S.C. Section 1367; Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. Section 6971.

[5] Asbestos School Hazard Detection and Control Act, 20 U.S.C. Section 3608.

regulatory scheme since it does not apply. This is an area chosen by Congress *not* to be regulated or preempted, consequently there can be no explicit congressional mandate upon which the Illinois Supreme Court has intruded.

However, a similar provision is contained in the National Labor Relations Act,[6] which provides for an administrative remedy for an employee discharge or discriminated against who has filed charges or otherwise given testimony in a proceeding under that act involving an unfair labor practice.[7] An employee discharged before bringing an action under the N.L.R.A. or participating in proceedings under that act may indeed have been discharged under circumstances that would constitute an unfair labor practice. While it does not fall precisely within the purview of Section 158(a)(4) the employee may nevertheless have a cause of action for retaliatory discharge under the law in Illinois if he were discharged in retaliation for complaining internally contrary to the clearly mandated public policy expressed in that federal enactment.

The Illinois Supreme Court, in its' decision below, rather than creating a conflict with the federal scheme of Section 210, permits a remedy not otherwise contemplated by that provision. Rather than creating a precedent for further intrusion by state courts into federally regulated areas, the decision is consistent with the limited remedies provided by Congress in

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[6] 29 U.S.C. Section 158, *et seq.*

[7] 29 U.S.C. Section 158(a)(4); See *N.L.R.B. v. Schrivener*, 405 U.S. 117 (1972) and *N.L.R.B. v. Retail Store Employees Union, Local 876*, 570 F.2d 586 (6th Cir. 1978).

this and similar enactments. The petitioner can point to no explicit congressional mandate providing that Section 210 is an exclusive remedy, nor that it is contemplated as an exclusive remedy in other federal enactments, nor can it claim that the regulatory scheme is so all pervasive as to render enforcement of congressional purposes impossible or present an obstacle to the accomplishment of congressional purposes. It is simply a broader remedy than that contemplated by Congress and properly within the traditional scope of the states to determine the reach of their tort remedies.

CONCLUSION

For the reasons stated, this Court should deny the Petition for Certiorari and remand the case to the Illinois Supreme Court for appropriate action.

Respectfully submitted,

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